

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of)
) CC Docket 92-77
Billed Party Preference)
for 0+ InterLATA Calls)

REPLY COMMENTS OF
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION

America's Carriers Telecommunications Association ("ACTA"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.

In its initial comments, ACTA expressed the opposition of those of its members most directly affected by the proposed adoption of billed party preference ("BPP") policy. ACTA outlined the numerous and often contradictory facts, opinions, studies and reports which had been submitted in the first series of comments and replies over two years earlier. ACTA observed that given the patent inconclusiveness of the record that had been developed up to that point, the Commission could not have justified, based on that record, adoption of BPP as furthering the public interest. In finding it necessary to release the current Further Notice of Proposed Rulemaking ("FNPR") in order to update the record, the Commission itself revealed its own recognition of the problems created by the state of the previous record in this docket.

Given the conflicting views, opinions, facts and estimates contained from the first round of comments and replies, ACTA argued that the decision to adopt certain tentative conclusions supporting implementation of BPP, based on the "consumer" dividends ostensibly derived from

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the earlier record (despite the conflicting nature of the record), was not justified. ACTA's concern about such an approach is based on a fundamental phenomena of regulatory history. Regulatory practitioners are aware that "tentative" conclusions, once published, most often become justified solely by their existence. The natural incentive of the regulatory agencies is to resist modifying, much less abandoning, those "tentative" conclusions, even if overwhelming evidence is presented and such conclusions are in error, contrary to fact, and that the assumptions and estimates on which the conclusions are based are, at best, no more meritorious than other assumptions and estimates which support totally contrary conclusions.

ACTA and other interested parties who conferred with the Commission were assured however, that in this docket, the use of tentative conclusions was more circumspect. In this case, the conclusions were to serve only as a tool to enhance the potential that the record on BPP would be made definite and certain enough to, once and for all, make a final determination to adopt or abandon BPP as a regulatory policy. In other words, despite the tentative conclusions about the anticipated consumer "benefits" of BPP contained in the FNPR, the ultimate decision on whether it was possible to make a finding of a positive cost/benefit relationship would be determined on the facts and arguments submitted in the initial and reply rounds of comments submitted in response to the FNPR.

It is ACTA's position that the record is factually insufficient to support a finding that adopting BPP will serve the public interest. This assertion is not founded on a mere disagreement with those who filed comments in support of BPP, but rather on the legal insufficiency of the arguments and "facts" presented in support of adopting BPP.

The Commission has the duty to root its policy decisions in substantial evidence that is on the record, taken as a whole. Where it does not do so, its decisions are challengeable as being "arbitrary and capricious." One searches in vain for the type of substantial evidence in this record which would satisfy the Commission's decisional burden. Most importantly, this further round of comments only reaffirms the uncertainty and disagreement over the actual cost/benefit relationship of implementing BPP, an uncertainty which was first evidenced in the initial round of comments two years ago. In ACTA's view, this fact alone is decisionally controlling.

Whatever the actual cost/benefit trade-offs actually are (and no one can say with any assurance, after reading the current record, if such a determination is even possible), and despite the existence of the earlier record and the Commission's diligent effort to analyze that record in a positive manner, no consensus is shown to exist among the commenters this second time around. In short, what has been clearly demonstrated by the second round of comments is that the same problems of uncertainty, the same lack of truly verifiable facts and assumptions, the same threat to small competitors and competition, and the same concerns for imposing an inane policy, sure to cause the expenditure of significant time and resources, for little or no benefit proportionate to those expenditures, exists today.

For example, Ameritech states in its comments that it finds the benefits of BPP still to be outweighed by its costs. Bell Atlantic indicates that it prefers a rate cap, a consumer education program, a fixed fee to replace commissions, and call transfer rules. BellSouth cites the existence of new products and services providing consumers with a range of better

alternatives to BPP. NYNEX argues that the FCC has both overstated the benefits of BPP, and understated its costs by hundreds of millions of dollars.

Further, USTA is concerned about just the planning costs for small independent telcos. NTCA and OPASTCO simply assert that the costs will outweigh the benefits. A consulting firm, GVNW Inc./Management, submits a "belief" that small telcos could afford BPP, provided that they are required to do so "only as soon as economically feasible and practical."

AT&T too submits evidence that the Commission has understated costs and ignored other costs all together, such as the overhead costs of reballoting, carrier change orders, 14-digit screening, and inclusion of commercial credit card usage.

Cogent oppositions were submitted by Cincinnati Bell and Southern New England Telephone. Cincinnati Bell argued that the methodology proposed would force telcos "to provide a new service with bottleneck characteristics at proportionally excessive costs with no assured method of cost recovery." SNET wants scarce capital to be spent "to develop a more productive infrastructure and to meet market needs."

Even those who appear to "support" BPP, actually support something essentially other than BPP. Pacific Telesis supports BPP, but not if a seemingly critical component - 14-digit screening for line-number based calling cards - is included. Southwestern Bell urges adoption of another form of BPP which also excludes 14-digit screening. GTE "supports" BPP but also disagrees with the Commission's cost estimates as being inadequate to reflect true costs of 14-digit screening and the exclusion of inmate phones. Rochester Tel and RCI Long Distance oppose BPP and argue for expanded awareness of dial-around capabilities already in place.

Unstinting support for BPP may be said to have been given by some commenters - but their small number should be viewed as symptomatic of the actuality that BPP is, in reality, a solution looking for a problem. For example, an individual commenter cites an example of what appears to be excessive pricing and complains that because there are "[n]o cops [around there are] no speed limits."

This individual's frustration may be understandable, but it is no basis for expending hundreds of millions of dollars, injuring competition, and dislocating significant investment and significant employment of many small businesses. Moreover, there are "cops" around and Congress has provided significant funding and specific directives to deploy those "cops" and issue the appropriate "speeding tickets." Perhaps the comments of this "Mr. Ordinary Jones" suggest that a better job needs to be done to educate the public about their rights under TOCSIA and the complaint procedures of the Communications Act. The facts are that "Mr. and Mrs. Ordinary Jones [do in fact have] recourse to overcharging by an OSP." That recourse need only be employed and responded to effectively.

Message Phone, Inc., an entrepreneurial research firm, has submitted comments claiming to have developed more cost effective technology for BPP. ACTA applauds all entrepreneurial efforts, but it cannot simply accept, nor can the Commission, unsupported statements and estimates that this new technology will actually achieve the reduction in costs that is claimed. Moreover, even should the claims prove true, the issues here are more complex than reducing the costs to implement BPP.

ACTA recognizes that two large IXCs, Sprint and MCI, support BPP. But there also are important areas of disagreement between both of these IXCs and the other commenters

concerning significant BPP details. For example, Sprint states that its implementation costs are coming down, and that it believes that ongoing expenses will be offset by savings in other areas, but Sprint's comments also contradict the concerns of other supporters such as Pacific Telesis, by claiming that the additional costs of implementing 14-digit screening "appear to be quite modest."

MCI wants BPP implemented in 18 months; Sprint argues for a two and a half year implementation period. Yet the record is devoid of any facts that could be used to reconcile the difference of a one year time frame. More importantly, the mere difference in MCI's and Sprint's positions once again indicates the critical divergence of views on the actuality of BPP's deployment, costs and other factors.

While several state commissions support BPP, one such commission properly points out that the FCC's failure to resolve the key issue in an earlier phase of this docket has contributed to some of the problems that the Commission tentatively concludes BPP will resolve. The Missouri Public Service Commission encourages the FCC to "reconsider its decision in Phase I of this docket to refrain from compelling card issuers to honor validation requests from other carriers, if [BPP] is not adopted."

The Idaho Commission bemoans "consumer naivete" and believes the consumer should not be "forced" to use the provider chosen by the premises owner instead of the carrier preferred by the customer. Such logic is faulty, as it ignores the rights of the premises owner and the OSP business person to compete and participate in the industry, and most significantly, the consumers who are perfectly content to use the provider made available or are unconcerned about the whole question. Colorado, on the other hand, supports rate ranges which it believes

will provide the "types and magnitude of benefits sought by the FCC, but at a minimum of costs relative to BPP." However, the national representative of the states, NARUC, gave no endorsement to BPP. NARUC is more concerned about the impact on separations and clearly would oppose BPP if the separations process resulted in the bulk of BPP costs being shifted to the intrastate jurisdiction. The National Association of Utility Consumer Advocates believes BPP is preferable to rate caps because "some OSPs have evaded the existing rules... [which] does not inspire confidence in regulators' ability to enforce additional regulations." The vast majority of honest, dedicated OSP providers may rightfully take umbrage at such reasoning. It is always bad public policy to burden the whole of society or any segment of it with disproportionate obligations and punitive requirements based on the alleged belief of the existence of a few bad apples. Using the metaphor of Mr. Ordinary Jones, and following this line of reasoning, does it follow that simply because there are some drivers that "get away" with speeding, therefore all driving should be restricted to cars equipped with "speed governors," and allowed to traverse only new, yet to be constructed (at high and indeterminate costs) toll roads designed and programmed to ensure that no one has neutralized the governor device.

And perhaps the most galling comment is to suggest that the industry and the public in general should once again be taxed to add aid and comfort to those incarcerated for violating society's laws. ACTA has as much sympathy for the families of the less fortunate as any other group of honest businesses that is attempting to serve the public in an environment that is dominated by former monopolies (albeit in a recently acquired oligopolistic status). But to justify such an unworkable program as BPP simply because persons convicted of breaking the law apparently deserve to have "service quality" competition versus price caps is a bit extreme.

Arrayed against BPP in a phalanx of opposition are the small businesses which will bear the devastating brunt of BPP. There is no need here to belabor the points made in opposition, as these points are obvious on the record once again made in this docket. The contradictions in opinion and assumption, the unproven nature of basic assertions, and the unverifiable conclusions of selected studies juxtaposed with the untested validity of the criticisms of contrary studies cannot be ignored in the pursuit of sane, rational and defensible policy. In view of these considerations, the Commission should refuse to pursue BPP and instead -

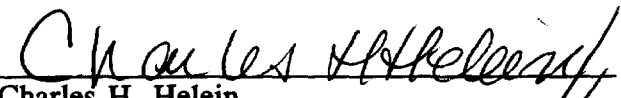

- * Revisit and adopt fairer and competitively more just calling card validation procedures and requirements;
- * Investigate how its enforcement of the tools Congress has already provided in the complaint process of the Communications Act, as bolstered by TOCSIA, could be stepped up and improved to address and cure any specific instances of excessive practices;
- * Expand programs for consumer awareness and work with industry representatives, like ACTA, to adopt codes of conduct for their memberships;
- * Concentrate resources on improving the infrastructure and eliminating artificial barriers to more effective competition by which consumers will truly obtain more responsive services at reasonable costs;
- * Eschew the temptation to announce a supposed "telecommunications consumer dividend" at the expense of ignoring the serious dislocations that will be caused to all telecommunications users by having eliminated, as a result of adopting a policy like BPP, the small businesses seeking to serve all users;

* Analyze BPP under the Regulatory Flexibility Act for BPP's impact on the small independent telcos, small OSPs, and other small businesses affected.

BPP continues to be a solution looking for a problem. Sound policy cannot be fashioned in such an environment. Given the rapid changes in telecommunications, the rich promises the future holds for increased consumer, economic and international competitiveness benefits, and the limitation of resources of time, energy and money, the Commission should now recognize that BPP is a policy whose time will never come, and the justification for which can never be made.

Respectfully submitted,

AMERICA'S CARRIERS
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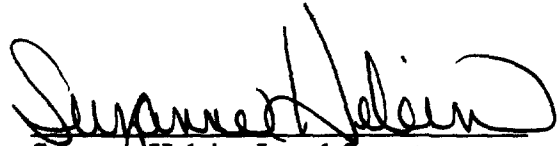
CERTIFICATE OF SERVICE

I, Suzanne Helein, a secretary in the law offices of Helein & Waysdorf, P.C., do hereby state and affirm that copies of the "Reply Comments of America's Carriers Telecommunications Association," in CC Docket 92-77, were served via hand delivery, this 14th day of September, 1994, on the following:

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